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# Casenotes: Admiralty — Maritime Garnishment — Proceeds of Partially Executed Contract of Affreightment Held Subject to Garnishment Even Though Bills of Lading Not Delivered and Debt Unmatured. *Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648 (4th Cir. 1977)

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ADMIRALTY — MARITIME GARNISHMENT — PROCEEDS OF PARTIALLY EXECUTED CONTRACT OF AFFREIGHTMENT HELD SUBJECT TO GARNISHMENT EVEN THOUGH BILLS OF LADING NOT DELIVERED AND DEBT UNMATURED. *IRAN EXPRESS LINES v. SUMATROP, AG*, 563 F.2d 648 (4th Cir. 1977).

In *Iran Express Lines v. Sumatrop, AG*,<sup>1</sup> the United States Court of Appeals for the Fourth Circuit held that a contract of affreightment<sup>2</sup> had been partially executed by partial loading of cargo on the vessel by the shipper,<sup>3</sup> and thus writs of maritime garnishment served on the shipper by a third party were effective to garnishee freights<sup>4</sup> under the contract. The court so held even though bills of lading<sup>5</sup> had not been delivered to the shipper<sup>6</sup> when the writs were served, and the shipper's debt to the carrier for freight was unmatured.<sup>7</sup> In reaching its conclusion, the court applied the rule that a contract of affreightment that is partially executed gives rise to a vessel's lien for freight on the cargo to the extent that it has been loaded.<sup>8</sup>

## I. FACTUAL BACKGROUND

The action of garnishment in the case *sub judice* grew out of an admiralty action brought by Iran Express Lines (Iran Express) against Sumatrop, AG (Sumatrop) in the United States District Court for the District of Maryland. In that case, Iran Express sought damages for off-hire<sup>9</sup> and cargo damage allegedly occurring during a

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1. 563 F.2d 648 (4th Cir. 1977).

2. A contract of affreightment is a maritime contract for the carriage of cargo. See *Morrissey v. S.S.A. & J. Faith*, 252 F. Supp. 54 (D. Ohio 1965).

3. A shipper is an owner or bailee of goods who contracts with a carrier for their transportation. See *New York Cent. Ry. v. Singer Mfg. Co.*, 3 N.J. Misc. 1137, 1142, 131 A. 111, 114 (1925).

4. Freights are the monies due the carrier for transporting the goods. *The Bill*, 55 F. Supp. 780 (D. Md. 1944).

5. Outbound bills of lading are governed by the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1970) [hereinafter cited as *Cogsa*]. *Cogsa* requires that the bill contain a "clause paramount" indicating that it is to be subject to the provisions of the Act. 46 U.S.C. § 1312 (1970); see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, § 3-44 (2d ed. 1975) [hereinafter cited as *GILMORE & BLACK*]. Iran Express argued that this rendered the bills of lading mere receipts and that *Cogsa* should control on the question of when the bills were due. Brief for Appellant at 19, *Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648 (4th Cir. 1977). Section 1303(3) of *Cogsa* does require the carrier to issue bills of lading upon receipt of the goods, but qualifies the duty by adding "on demand of the shipper." Presumably, no such demand was made in the instant case.

6. Freight is due and payable only upon surrender of signed bills of lading. Cf. *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d 188 (9th Cir. 1962) (prepaid freights due upon loading unless contract provides otherwise).

7. 563 F.2d at 651.

8. *Id.* at 650-51 (citing *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923)).

9. Off-hire is a deduction from the amount a charterer owes a vessel owner, resulting from delays caused by the owner or the inability of the charterer to

time charter.<sup>10</sup> Iran Express's claims against Sumatrop were subject to an arbitration clause in the time charter.<sup>11</sup> Thus, to provide security in the event of a favorable arbitration award, Iran Express sought to garnishee all freights in Central Soya International's (Soya) hands due Sumatrop under a subsequent contract of affreightment<sup>12</sup> between Soya and Sumatrop.

Soya, the shipper, and Sumatrop on February 26, 1975 entered into a charter party<sup>13</sup> whereby Sumatrop, the disponent owner<sup>14</sup> of the M/V ASTYANAX, agreed to carry 10,000 tons of Soya's soybean meal from Baltimore to several European ports at a contract price of \$100,000. Pursuant to the contract, Soya caused 3,456 tons of meal to be loaded on the vessel. A longshoremen's strike occurred at midnight on April 30, 1975, however, preventing the loading of the remaining cargo.

Iran Express had writs of maritime garnishment served on Soya on April 30, 1975 during loading, and on May 9, 1975 after loading ceased. In order for the writs of garnishment to have been effective,

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enjoy use of the vessel for some time during the charter. See *The Yaye Maru*, 274 F. 195 (4th Cir. 1921), *cert. denied*, 257 U.S. 638 (1922).

10. A time charter is a type of charter party whereby the shipowner's agents navigate and manage the vessel, "but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period." GILMORE & BLACK, *supra* note 5, at 194. See *Iran Express Lines v. Sumatrop, AG*, No. B75-526, slip op. at 6 (D. Md. July 15, 1976).
11. 9 U.S.C. § 8 (1970) provides, in part, that "the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration." See *Iran Express Lines v. Sumatrop, AG*, B75-526, slip op. at 6 (D. Md. July 15, 1976).
12. FED. R. CIV. P. SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS, RULE B [hereinafter SUPP. RULE B] authorizes this process. The rule provides, in part, as follows:

[W]ith respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees . . . If the defendant shall not be found within the district. . . . In addition, or the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property.

The process of attachment is employed against the defendant's goods and chattels; garnishment, on the other hand, is employed against the credits and effects of the defendant in the hands of a third party. See *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825).

13. A charter party is a "specific and . . . an express contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use." *Jones & Laughlin Steel Corp. v. Vang*, 73 F.2d 88, 91 (3d Cir. 1934).
14. A disponent owner is one who is "an owner to the extent that he has the right to dispose of the use of the vessel in the manner contemplated by the charter. It may indicate that the one making the charter has the vessel under charter from another; it may also indicate that he is agent for the owner." N. HEALY & D. SHARPE, *CASES AND MATERIALS ON ADMIRALTY*, 407 (1974) [hereinafter cited as HEALY & SHARPE].

two prerequisites had to have been met. First, the defendant, Sumatrop, had to have been absent from the district,<sup>15</sup> and second, there had to have been a *res*, a "credit or effect,"<sup>16</sup> within the district due Sumatrop to which the writ could have attached.<sup>17</sup> Once Sumatrop submitted to the court's jurisdiction, writs of garnishment thereafter served would have been ineffective because Iran Express would have had recourse against Sumatrop itself.<sup>18</sup> On May 9, 1975 Sumatrop entered a general appearance to petition for a stay of the original action pending arbitration.<sup>19</sup> As a practical matter, Sumatrop's general appearance rendered futile any subsequent attempts by Iran Express to garnishee freights due Sumatrop. Within one hour of Sumatrop's general appearance, Soya, the garnishee, answered that because the bills of lading had not been issued by Sumatrop, no freight was yet due from Soya to Sumatrop. Accordingly, Soya alleged that there was no "credit or effect" to which Iran Express's writs of garnishment could attach. In sum, the garnishee, Soya, contended that the writs already issued were ineffective, and the defendant Sumatrop's general appearance precluded the effectiveness of any subsequent writs.<sup>20</sup>

On or before May 12, 1975 Soya agreed to pay Sumatrop \$35,000 freight for the cargo loaded before the commencement of the strike. Bills of lading dated April 30, 1975 were signed and delivered to Soya on May 12, and Soya then caused the freight due to be paid. The M/V ASTYANAX sailed from Baltimore with the 3,456 tons of meal on May 13, 1975.

Iran Express moved for an order compelling Soya to deposit \$35,000 into the registry of the district court. Iran Express contended that when the writs of garnishment were served, the freight was owed and therefore subject to garnishment.<sup>21</sup>

In ruling on Iran Express's motion, the district court held that the writs were nullities because Sumatrop had entered its general appearance before the freights were due.<sup>22</sup> The court found that the

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15. See note 12 *supra*; e.g., *Chilean Line Inc. v. United States*, 344 F.2d 757, 759-60 (2d Cir. 1965).

16. See note 12 *supra*.

17. *Cf. D/S A/S Flint v. Sabre Shipping Corp.*, 228 F. Supp. 384 (E.D.N.Y. 1964), *aff'd*, 341 F.2d 50 (2d Cir. 1965) (writ invalid because defendant was present in the district, and credits attached at bank were not).

18. *Cf. Swift & Co. v. Compania Colombiana*, 339 U.S. 864, 867 (1950) ("while the process [of attachment] may be utilized only when a respondent is not found within the jurisdiction, an attachment is not dissolved by the subsequent appearance of respondent").

19. See 9 U.S.C. § 3 (1970), which provides, *inter alia*, that "the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until . . . arbitration has been had in accordance with the terms of the agreement."

20. Soya's plea was *nulla bona*, or no goods. *Iran Express Lines v. Sumatrop*, AG, No. B75-526, slip op. at 7 (D. Md. July 15, 1976).

21. 563 F.2d at 650.

22. No. B75-526, slip op. at 12 (D. Md. July 15, 1976).

contract of affreightment was still executory when the writs were served because numerous contingencies could have occurred that would have excused Soya's performance under the contract.<sup>23</sup> Since the court determined that the contract was executory, it held that Soya had not yet incurred a debt that could be subject to garnishment by Iran Express.<sup>24</sup> Iran Express appealed the court's ruling.

## II. THE COURT'S OPINION

The court of appeals began its analysis by observing that the clause in Sumatrop's bills of lading providing that freight was "deemed earned on cargo as loaded on board,"<sup>25</sup> did not refer to the time when payment became due. Rather, the clause dealt with the time when risk of loss passed from shipper to carrier. The court also pointed out that freight is due and payable only upon surrender of signed bills of lading.<sup>26</sup> These rules, the court continued, are not determinative of the validity of the garnishment because maturity of debt is not a prerequisite for an effective garnishment.<sup>27</sup> Since an unmatured debt is subject to garnishment provided it arises from an executed contract,<sup>28</sup> the court viewed the crucial question to be whether the contract of affreightment became executed before Sumatrop entered its general appearance.<sup>29</sup>

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23. *Id.*

24. The trial judge also granted Sumatrop's petition that the proceedings be stayed pending arbitration and denied the requests of Soya and Sumatrop that the court decline to exercise jurisdiction. Regarding the latter ruling, the judge reasoned that although all parties were foreign corporations, there were sufficient contacts with the United States in various phases of the transactions to warrant the exercise of jurisdiction. See *Danielsen v. Entre Rios Rys. Co.*, 22 F.2d 326, 327 (D.C. Md. 1927) (where no reason to the contrary exists, such discretionary jurisdiction should be exercised). Neither Soya nor Sumatrop challenged these rulings on appeal. 563 F.2d at 650 n.2.

Sumatrop also contended that the situs of the debt was New York, according to the contract, and the rule of *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 489 (1825), that goods or credits must be found within the jurisdiction in order for an attachment to be effective should be applied. But the trial judge, citing *The Copperfield*, 7 F.2d 499 (S.D. Ala. 1925) ruled that since the garnishee was doing business in the District of Maryland, the debt was subject to garnishment there. Of course, in finding the contract of affreightment executory when the writs were served, the judge ruled in effect that no such debt then existed. No. B75-526, slip op. at 10-11 (D. Md. July 15, 1976).

25. 563 F.2d at 650.

26. *Id.* See *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d 188 (9th Cir. 1962).

27. See *Robinson v. O.F. Shearer & Sons, Inc.*, 429 F.2d 83 (3d Cir. 1970).

28. *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d at 193.

29. 563 F.2d at 650. Attachment under SUPP. RULE B has a two-fold purpose: (1) to obtain *in personam* jurisdiction over a defendant through his property, and (2) to provide security for any decree in favor of the plaintiff. The two purposes may not be separated; security may not be obtained except as an adjunct to jurisdiction. *Seawind Compania v. Crescent Line, Inc.*, 320 F.2d 580, 581-82 (2d Cir. 1963). Given this two-fold purpose of attachment, see note 12 *supra*, an actual appearance by the defendant prior to the attempted levy on his property

With the issue thus narrowed, the court determined that a contract of affreightment becomes executed when a vessel's lien on cargo for freight arises.<sup>30</sup> The court observed that the vessel has a lien on cargo for unpaid freight unless the charter party otherwise provides.<sup>31</sup> The lien cannot arise until the contract has been executed,<sup>32</sup> and execution occurs when the cargo is delivered to the vessel.<sup>33</sup> Significantly, if the contract is only partially executed, that is, if the cargo has been only partially loaded, the vessel's lien nevertheless attaches to the portion of the cargo loaded.<sup>34</sup> The court concluded that since 3,456 tons had been loaded by May 9, 1975 when the second writ was served on Soya,<sup>35</sup> the contract had been partially executed, giving rise to the lien. Given the existence of a vessel's lien, the writ effectively garnisheed the freight due on the loaded cargo.<sup>36</sup> Thus, the court employed a three-step process: (1) a vessel's lien attached to the extent that cargo was loaded, (2) the existence of a vessel's lien evidenced the execution of the contract of affreightment, and (3) since the contract was executed, a writ of

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defeats the attachment. See *Fernandes v. United Fruit Co.*, 303 F. Supp. 681, 683 (D. Md. 1969).

Interestingly, in *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978), SUPP. RULE B(1) was held unconstitutional. Relying upon *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), the district court found the rule "insufficient to protect defendants from mistaken deprivations of property." 450 F. Supp. at 459. Because there was no judicial participation in the issuance of the writ, and the defendant's absence from the district was verified only by counsel for the plaintiff, the court found the defendant's procedural due process rights to have been violated. *Id.* at 457. The due process issue was not raised in *Iran Express*.

30. 563 F.2d at 651.

31. *Id.* at 650-51. *Accord*, *The Eddy*, 72 U.S. (5 Wall.) 481, 493-94 (1866).

32. 563 F.2d at 651. "No lien attaches for breach of an executory contract, even though the contract is of a type which normally gives rise to a lien." *GILMORE & BLACK*, *supra* note 5, at § 9-22; *cf.* *Acker v. The City of Athens*, 177 F.2d 961 (4th Cir. 1949) (where passengers failed to board ship, contract remained executory and no lien could attach).

33. *Bulkley v. Naumkeag Steam Cotton Co.*, 65 U.S. (24 How.) 386, 393-94 (1860).

34. See *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 499-500 (1923).

35. Presumably, *Iran Express* caused a second writ to be issued on May 9 after loading ceased because at that time its contention regarding execution would have been stronger. Sumatrop arguably would have been obliged to issue bills of lading, triggering Soya's obligation to pay. See note 5 *supra*.

36. 563 F.2d at 651. The court's authority for this proposition is *San Rafael Compania Naviera v. American Smelting and Ref. Co.*, 327 F.2d 581 (9th Cir. 1964). Although payment in *San Rafael* was not due until five days after the valid writ was served, the contract was executed in all other respects, unlike that in *Iran Express*. The court in *Iran Express* also cited 7A MOORE'S FEDERAL PRACTICE B.05 at B-207 (2d ed. 1976) without quoting from it. The applicable passage suggests that "if the contract is divisible and the executory portion is separate and distinct, garnishment of debts for executed portions of the contract *should be permitted*." (emphasis added). Although the proposition appears sound, if of doubtful relevance, no authority is cited. See note 56 *infra*.

garnishment could attach absent any contingencies excusing Soya's performance.<sup>37</sup>

In dicta, the court justified its conclusion by observing that neither shipper nor owner is prejudiced by this finding.<sup>38</sup> Since a shipper can retain the freight subject to an order of court or pay the freight into the registry of the court to discharge the lien, the vessel is free to assert its rights to the freight as against the party who caused the writ of garnishment to be served.<sup>39</sup>

The court of appeals reasoned that the district court erred when it ruled that "because contingencies could have occurred which would have excused . . . Soya's performance under the charter,"<sup>40</sup> the contract was still executory when the second writ, that of May 9, 1975, was served. The charter party itself provided for a lien on cargo for freight. Moreover, the lien, and thus execution, was not conditioned upon the surrender of the bills of lading or upon the nonoccurrence of a strike.<sup>41</sup>

Finally, the court observed that the charter party provided for payment of \$3,500 demurrage<sup>42</sup> for Soya's delays in loading unless the delay was caused by a strike, and that neither party could claim damages occasioned by a strike. These were the only protections the contract afforded Soya relative to strikes.<sup>43</sup> Although the parties could have contracted to excuse Soya's performance upon the occurrence of a strike, they did not do so; Soya remained obligated to perform. Therefore, although the debt resulting from Soya's partial loading had not yet matured because no bills of lading had been delivered, the debt was nonetheless subject to garnishment by Iran

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37. Iran Express Lines v. Sumatrop, AG, 563 F.2d at 650-51.

38. But see text accompanying notes 71-73 *infra*.

39. 563 F.2d at 651. SUPP. RULE B(3)(a) reads, in part: "[i]f [the garnishee] admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court."

40. 563 F.2d at 651.

41. This observation is relevant only if the yardstick for execution discussed above is applied because the vessel's inchoate lien for freight arises as the cargo is loaded, even though traditionally no freight is due that would be subject to garnishment. The court cited GILMORE & BLACK, *supra*, note 5 at § 5-22 on the question of when the vessel's lien on cargo arises: "when the affreightment contract has been only partially performed — in a sense that only part of the cargo contracted for has been delivered to the ship and placed under its control — the lien attaches only in respect to the cargo actually delivered." Elsewhere in their treatise, the authors discuss the nature of this lien. "Such a lien can certainly be enforced by the action *in rem*, but it is questionable how far it ought to be regarded as a genuine maritime lien in the strict sense, for it does not survive unqualified delivery of the goods, and hence seems more like the possessory lien of the carrier at common law." GILMORE & BLACK, *supra* note 5, at § 3-45 (citing 4885 Bags of Linseed, 66 U.S. (1 Black) 108 (1861)).

42. Demurrage is a penalty the charterer must pay the carrier under a voyage charter for delays in loading and discharging cargo. HEALY & SHARPE, *supra* note 14, at 440.

43. 563 F.2d at 651.

Express. Accordingly, the court reversed the judgment of the district court and instructed it to require Soya to pay \$35,000 into the registry.<sup>44</sup>

### III. ANALYSIS

The writ of foreign attachment or garnishment may be directed against "the goods and chattels or rights and credits of the debtor."<sup>45</sup> It may be carried into operation "by actual arrest of goods . . . or by notice of the object of the proceeding to those who have either or both in their possession."<sup>46</sup> Moreover, if the garnishee has any money due the defendant in his hands "at the time of the attachment, or at any time after,"<sup>47</sup> an otherwise valid garnishment will succeed. In fact, equitable interests are subject to garnishment,<sup>48</sup> as are letters of credit held by a bank.<sup>49</sup> Because the two inseparable purposes of foreign attachment are the securing of respondent's appearance and the assuring of satisfaction in the event the suit is successful,<sup>50</sup> an appearance prior to attachment renders the writ a nullity. An appearance subsequent to a valid attachment, however, does not affect its validity.<sup>51</sup>

The *Iran Express* court recognized some of these propositions as well-settled. Specifically, the court observed that there must be a credit, here, the obligation to pay under the executed contract, for the writ to attach.<sup>52</sup> Additionally, the court noted that the attachment must occur prior to the defendant's general appearance.<sup>53</sup> The court necessarily perceived the crucial issue to be whether the partial loading of the cargo was sufficient to give rise to an obligation, which in turn created a credit. If so, then the writ was effective, as it was undisputed that the writs were served before Sumatrop entered its general appearance.

The court of appeals reversed the lower court because it was convinced that the partial loading and the absence of any

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44. In a concurring opinion, Judge Hall rejected the court's holding that freights were subject to garnishment prior to complete execution unless the parties had agreed to alter the contract. The basis of the concurrence was that Soya and Sumatrop should not have been permitted to "use timing and connivance to skirt attachment." 563 F.2d at 652. Thus, in Judge Hall's view, reversal should have been based not upon the vessel's lien/partial execution analogy, but upon equitable grounds.

45. *Smith v. Miln*, 22 Fed. Cas. 603, 605 (1848) (decided on the basis of ADMIRALTY RULE 2, predecessor of SUPP. RULE B).

46. 22 Fed. Cas. at 605.

47. *Id.* at 606.

48. *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (2d Cir. 1929). In *Kingston*, the attachment of boats in the respondent's possession, which were held by the respondent as vendee under a conditional sales contract, was sustained. *Id.* at 266-67.

49. *D.K. Manu. Co. v. S.S. Titan*, 1964 A.M.C. 78 (S.D.N.Y. 1963).

50. *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 489 (1825).

51. *Birdsall v. Germain Co.*, 227 F. 953, 955 (S.D.N.Y. 1915).

52. 563 F.2d at 651.

53. *See id.* at 650.



contingencies that might have excused Soya's performance rendered the contract sufficiently executed, notwithstanding the absence of a specific contract price. Presumably, had the court been convinced that Soya and Sumatrop had agreed to a novation of the contract subsequent to Sumatrop's general appearance, it would have had to have found that no attachable *res* existed when the writs were served. The court, however, deftly sidestepped the timing question of when the final contract figure was arrived at and focused on the partial loading as execution. The court of appeals viewed the agreement between the defendant and the garnishee, even if after Sumatrop's general appearance, as merely having the effect of deeming partial performance to be full performance.<sup>54</sup>

*Iran Express* is significant to the admiralty bar because of the yardstick employed by the court to measure the execution of a contract of affreightment. To arrive at its conclusion, the court departed from the traditional standard for determining when execution occurs in cases of maritime garnishment of bill of lading freights, that is, delivery of the bills. The court recognized that execution must be sufficient to create an obligation.<sup>55</sup> Because, however, the instant contract provided for a specific amount of cargo to be loaded and carried, Sumatrop technically was under no obligation to deliver bills of lading until that amount had been loaded. Consequently, under the old standard Soya was under no obligation to pay.<sup>56</sup> Thus, to reach its result, the court looked to the loading and employed the standard for execution applicable to the possessory<sup>57</sup> maritime lien of a vessel on cargo for freight.

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54. 563 F.2d at 651-52. Presumably, Sumatrop was not in a position to insist upon the full contract price of \$100,000. The charter party provided that Soya was not liable for demurrage if delay was caused by a strike. *Id.* at 651. Therefore, since voyage charter-hire was based on the completed voyage and not on the duration of the charter, Sumatrop was apparently more at the mercy of the striking longshoremen than was Soya. Soya could have waited out the strike and insisted upon full performance; it chose not to do so, presumably to facilitate delivery of the cargo already loaded. This probably caused Sumatrop to become amenable to settlement, that is, to deem partial execution as full execution and hence pro rate the freight.

55. *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d at 193.

56. The contract was not susceptible to interpretation as divisible, and therefore monies due on parts performed were not subject to garnishment on a divisibility theory. See *Socony-Vacuum Oil Co. v. C.M. Johnston & Sons Sand and Gravel Co.*, 103 F.2d 275 (8th Cir. 1939) (advance payments to independent contractors during construction of barges subject to garnishment since payments were in the nature of installments and in no case was final price to be less than the amount advanced); note 36 *supra*.

57. GILMORE & BLACK observe that the maritime lien is not dependent upon possession. GILMORE & BLACK, *supra* note 5, at §9-2. This is generally true, but the vessel's lien on cargo for freight is an exception to this rule. The cargo lien depends upon possession and is extinguished by an unconditional delivery of the goods. *E.g.*, *Beverly Hills Nat'l Bank and Trust Co. v. Campania de Navegacione Almirante S.A.*, (The Searaven), 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 966 (1971). See also note 41 *supra*.

It must be noted that the *Iran Express* standard requires more than a showing of the existence of a vessel's lien in order to warrant a finding of a credit that is subject to garnishment. There must also be no contingency that would excuse the garnishee's performance under the contract.<sup>58</sup> If the lien does not exist, it is clear that the contract is executory.<sup>59</sup> On the other hand, if contingencies exist, even given the presence of an inchoate<sup>60</sup> vessel's lien, the shipper could be freed from his obligation to pay freight, thus rendering garnishment improper.<sup>61</sup>

Although the court relied upon the absence of contingencies, it confined its discussion of them to those regarding strikes. Additionally, the grain charter provided that Soya was bound to pay freight whether the "vessel and/or cargo [was] lost or not lost."<sup>62</sup> Thus, even if the lien, dependent upon possession, were lost by the destruction or loss of the cargo<sup>63</sup> and with it the carrier's *in rem* cause of action, the carrier could still proceed *in personam* for the freight. The existence of this cause of action thus validates the earlier garnishment.

Notwithstanding the apparent soundness of the majority opinion, Judge Hall, in a concurring opinion,<sup>64</sup> expressed reservations based upon contract law. Judge Hall maintained that because the contract specified an exact amount of cargo to be loaded, "nothing was due Sumatrop upon which garnishment could attach"<sup>65</sup> until the entire amount contracted for was on board. This alone would give rise to Sumatrop's duty to issue bills of lading, and hence Soya's obligation to pay freight. He observed that had the contract been executed as the grain was loaded, "the amount due

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58. 563 F.2d at 651.

59. *Bulkley v. Naumkeag Steam Cotton Co.*, 65 U.S. (24 How.) 386, 393-94 (1860). "[T]he added advantages of lien status are reserved to claimants under executed contracts." GILMORE & BLACK, *supra* note 5, at §9-22. But execution is frequently broadly defined. In *Blair v. M/V Blue Spruce*, 315 F. Supp. 555 (D. Mass. 1970), a pilot whose services were refused by a vessel, but required by law, was deemed to have furnished necessities and therefore entitled to a maritime lien. "If a pilot only has a lien when the services have actually been performed, then the master simply refuses the services and the pilot has no recourse." *Id.* at 558.

60. "Both ship and cargo are figuratively said to be bound to each other by mutual and reciprocal obligations which can give rise to liens — or *inchoate rights to accrue on breach* — from the moment the cargo is laden aboard or delivered into the master's custody." 2 BENEDICT, ADMIRALTY, §41 (7th ed. 1974) (emphasis added). See *Duncan v. Kimball*, 70 U.S. (3 Wall.) 37 (1866); *Bulkley v. Naumkeag Steam Cotton Co.*, 65 U.S. (24 How.) 386 (1860); *The Olga S.*, 25 F.2d 229 (5th Cir. 1928).

61. See *Robinson v. O.F. Shearer & Sons, Inc.*, 429 F.2d 83, 85-86 (3rd Cir. 1970) (if impossible to determine if garnishee will ever have to perform, its obligation is aleatory and not absolute; thus garnishment not allowed).

62. 563 F.2d at 650.

63. Being dependent upon possession, the vessel's lien on cargo is atypical of maritime liens. See *N.H. Shipping Corp. v. Freights of S/S Jackie Hause*, 181 F. Supp. 165 (S.D.N.Y. 1960). See also notes 41 and 57 *supra*.

64. 563 F.2d at 652.

65. *Id.*

from Soya would have been \$34,560 instead of \$35,000.”<sup>66</sup> But because “the defendants attempted to use the law in such a way as to avoid its sting”<sup>67</sup> by delaying surrender of the bills of lading until after Sumatrop’s general appearance, Judge Hall would have reversed on equitable grounds.<sup>68</sup>

#### IV. CONCLUSION

Although the *Iran Express* opinion is brief and cryptic, it is also logical and creative. The court cited no authority for the proposition that “a contract which is executed for the purpose of perfecting a vessel’s lien for freight is also executed for the purpose of garnisheeing the freight.”<sup>69</sup> Close scrutiny of the opinion reveals no legal flaws; its application beyond the confines of the case *sub judice* is intriguing.

The majority avoided the implication of Judge Hall’s finding that the contract was not executed until all the grain was loaded by including in its holding the “no-contingency” requirement. By this holding, at least in the Fourth Circuit, freights, computed on the basis of cargo loaded, may be garnisheed<sup>70</sup> before the carrier is obligated to issue bills of lading. The general requirement of an obligation to support a garnishment remains nonetheless intact.

Perhaps of greater significance is the possible application of this decision in a non-garnishment context. Because the contract was deemed executed and thus able to support a garnishment, presumably the execution would have supported other actions against the freights as well.

An example is the vessel owner’s lien for charter-hire on subfreight<sup>71</sup> due the charterer from a shipper or subcharterer. Assume Sumatrop to have been a charterer owing charter-hire to the vessel’s owner and Soya to have been a subcharterer. If the owner’s

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66. *Id.* *Iran Express* did argue, however, that since there was a “5% more or less” clause in the grain charter, the amount paid was readily determinable by reference to the grain charter, and need not have been interpreted as a subsequent agreement. Reply Brief for Appellant at 1, *Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648 (4th Cir. 1977).

67. 563 F.2d at 652.

68. “Courts of admiralty have always professed to proceed upon equitable principles, unlike courts of law.” *Rice v. Charles Dreifus Co.*, 96 F.2d 80, 83 (2d Cir. 1938). See also *Esso Standard (Switzerland) v. The Arosa Sun*, 184 F. Supp. 124, 127 (S.D.N.Y. 1960) (“[a]dmiralty has not permitted technical niceties to defeat rights of foreign attachment.”).

69. 563 F.2d at 651.

70. The author of an earlier treatise on attachment preferred “garnished.” He lamented the corruption of the word into “garnisheed,” which he believed, “disfigures the Reports of this country.” DRAKE, *SUITS BY ATTACHMENT*, 454 n.1 (2d ed. 1858).

71. A debt for freights is a *res* as much as a ship is, and therefore subject to a lien. See *United States v. Freights, Etc. of the Mount Shasta*, 274 U.S. 466 (1927).

charter party reserved<sup>72</sup> a lien on subfreights for charter-hire, *Iran Express* would allow earlier enforcement of the owner's lien than would have been possible heretofore; the charterer (Sumatrop) would not be able to delay the delivery of the bills of lading for the purpose of delaying the ripeness of the lien for charter-hire. The existence of the carrier's (Sumatrop) lien on cargo for freight plus the absence of any contingencies excusing Soya's performance would render the contract executed, notwithstanding the non-delivery of bills of lading. Thus, the separate and distinct vessel owner's lien for charter-hire would be enforceable against the subfreights due Sumatrop. In sum, the vessel owner could proceed *in rem* to enforce its lien just as *Iran Express* was able to proceed with its garnishment.

Perhaps *Iran Express* has non-maritime implications as well. A carrier has a common law lien for freight on goods transported.<sup>73</sup> If a contract of carriage obligates a shipper to pay freight regardless of cargo loss or damage, *Iran Express* could be precedent for the proposition that freight could be garnisheed to the extent that cargo is loaded and before the carrier is obligated to issue bills of lading.

The *Iran Express* holding, although narrow, deals with a fundamental aspect of contract law, that is, the point at which a contract becomes executed. The full ramifications of the opinion, however, will have to await further judicial exposition.

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72. A lien on subfreights, unlike a vessel's lien on cargo, does not arise automatically by virtue of the general maritime law; it must be reserved contractually by the vessel owner. See *Marine Traders, Inc. v. Seasons Navigation Corp.*, 422 F.2d 804 (2d Cir. 1970).

73. See 13 C.J.S. *Carriers* § 325 (1955) and cases cited therein.